

Sheehy's Foodland, Inc./Town and Country Plaza and Local 881, United Food and Commercial Workers Union and Local 700, United Food and Commercial Workers Union. Cases 14-CA-22306 and 14-CA-22340

February 9, 1994

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND TRUESDALE

Upon a charge and amended charge in Case 14-CA-22306 filed by Local 881, United Food and Commercial Workers Union (Local 881), and a charge and amended charge in Case 14-CA-22340 filed by Local 700, United Food and Commercial Workers Union (Local 700), the General Counsel of the National Labor Relations Board issued an order revoking settlement, consolidated amended complaint and notice of hearing on September 21, 1993, against Sheehy's Foodland, Inc./Town and Country Plaza, the Respondent, alleging that it has violated Section 8(a)(1) and (5) of the National Labor Relations Act. Upon service of copies of the charges, amended charges, and consolidated amended complaint, the Respondent filed an answer. On November 4, 1993, the General Counsel of the National Labor Relations Board issued an amendment to its consolidated amended complaint. Thereafter, by letter of November 5, 1993, the Respondent withdrew its answer to the consolidated amended complaint and waived its right to file an answer to the amendment to the consolidated amended complaint.

On November 30, 1993, the General Counsel filed a Motion for Summary Judgment with the Board. On December 6, 1993, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

Ruling on Motion for Summary Judgment

Sections 102.20 and 102.21 of the Board's Rules and Regulations provide that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively notes that unless an answer is filed within 14 days of service, all the allegations in the complaint will be considered admitted. Further, the undisputed allegations in the Motion for Summary Judgment disclose that although the Respondent initially filed an answer to the consolidated amended complaint, it thereafter withdrew its answer and waived its right to file an answer to the amendment to the consolidated amended complaint. Such a withdrawal has the same effect as a failure to file an answer, i.e., the allegations

in the consolidated amended complaint must be considered to be admitted to be true. See *Maislin Transport*, 274 NLRB 529 (1985).

Inasmuch as the answer has been withdrawn, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, an Illinois corporation with an office and retail place of business in Marion, Illinois, has been engaged in the retail sale of groceries and related products. During the 12-month period ending January 31, 1993, the Respondent derived gross revenues in excess of \$500,000 and purchased and received products, goods, and materials valued in excess of \$5000 directly from points outside the State of Illinois. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that Local 881 and Local 700 are labor organizations within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Since about 1987, Local 881 and Local 700 have been the designated exclusive collective-bargaining representatives of separate units of the Respondent's employees and since then Local 881 and Local 700 have been recognized as such representatives by the Respondent. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which for Local 881 is effective from June 16, 1992, to June 17, 1994 (the Local 881 contract) and the most recent of which for Local 700 was effective from June 17, 1990, through June 12, 1993 (the Local 700 contract). The unit of the Respondent's employees set forth in article 2 of the Local 881 contract (the Local 881 unit)¹ and the unit of the Respondent's employees set forth in article 1 of the Local 700 contract (the Local 700 unit)² constitute units appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act. At all times since at least 1987, based on Section 9(a) of the Act, Local 881

¹ Art. 2 of the Local 881 contract provides,

The Union shall be the sole and exclusive collective bargaining agency for a bargaining unit consisting of all employees in the Employer's retail food establishments in the City of Marion, with respect to rates of pay, wages, hours and other conditions of employment, except and excluding supervisory employees, owners, manager, co-manager and owners of immediate family, within the meaning of the Labor-Management Relations Act of 1947, as amended.

² Art. 1 of the Local 700 contract provides,

The Company hereby recognizes the Union as the sole and exclusive bargaining agent for all employees working in the Company's Meat Departments in stores in Marion, IL 62959.

and Local 700 have been exclusive collective-bargaining representatives of the Local 881 unit and the Local 700 unit, respectively.

Since about January 14, 1993, Local 881 has requested that the Respondent furnish it with the records of all eligible members' IRA accounts. This information is necessary for, and relevant to, Local 881's performance of its duties as the exclusive collective-bargaining representative of the Local 881 unit. Since about January 24, 1993, the Respondent has failed and refused to furnish Local 881 with the information.

About January 30, 1993, the Respondent closed its Marion, Illinois facility. The effects of the closing relate to wages, hours, and other terms and conditions of employment of the Local 881 and the Local 700 units and is a mandatory subject for the purposes of collective bargaining. The Respondent closed its Marion, Illinois facility without prior notice to Local 881 or Local 700 and without affording them an opportunity to bargain with the Respondent with respect to the effects of this conduct.

The Local 881 contract provides in article 4 that the Respondent shall deduct union dues from employees' paychecks and remit such dues promptly to Local 881. It also provides in articles 9 and 11 that the Respondent shall pay its employees in the Local 881 unit holiday pay and vacation pay. Further, in articles 15 and 16, that the Respondent shall make certain payments on behalf of the employees in the Local 881 unit to the Health and Welfare Trust Fund and to IRA accounts. The Local 700 contract provides in articles 5 and 7 that the Respondent shall pay its employees in the Local 700 unit holiday pay and vacation pay; and in articles 19 and appendices A and B provide that the Respondent shall make certain payments on behalf of the employees in the Local 700 unit to the Health and Welfare Trust Fund and the Employer-Union Pension Fund. About January 30, 1993, the Respondent closed its store without making these payments, all of which relate to wages, hours, and other terms and conditions of employment of the Local 881 unit and the Local 700 unit, and are mandatory subjects for the purposes of collective bargaining. The Respondent engaged in this conduct without prior notice to Local 881 or Local 700, without affording them an opportunity to bargain with respect to this conduct, and without the consent of Local 881 or Local 700.

CONCLUSION OF LAW

By the acts and conduct described above, the Respondent has violated Section 8(a)(1) and (5) of the Act, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has failed to furnish necessary and relevant information to Local 881, we shall order the Respondent to furnish the information. As a result of the Respondent's unlawful failure to bargain in good faith with Local 881 or Local 700 regarding the effects of closure on unit employees, the terminated employees have been denied an opportunity to bargain through their collective-bargaining representatives. Meaningful bargaining cannot be assured until some measure of economic strength is restored to Local 881 and Local 700. A bargaining order alone, therefore, cannot serve as an adequate remedy for the unfair labor practices committed.

Accordingly, we deem it necessary, in order to effectuate the purposes of the Act, to require the Respondent to bargain with Local 881 and Local 700 concerning the effects of closing its facility on its employees, and shall accompany our Order with a limited backpay requirement designed both to make whole the employees for losses suffered as a result of the violations and to recreate in some practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences for the Respondent. We shall do so by ordering that the Respondent pay backpay to the terminated employees in a manner similar to that required in *Transmarine Corp.*, 170 NLRB 389 (1968).

Thus, the Respondent shall pay its terminated employees backpay at the rate of their normal wages when last in the Respondent's employ from 5 days after the date of this Decision and Order until occurrence of the earliest of the following conditions: (1) the date the Respondent bargains to agreement with Local 881 and Local 700 on those subjects pertaining to the effects of the closing of its facility on its employees; (2) a bona fide impasse in bargaining; (3) Local 881 and Local 700's failure to request bargaining within 5 days of the date of this Decision and Order, or to commence negotiations within 5 days of the Respondent's notice of its desire to bargain with them; (4) Local 881 and Local 700's subsequent failure to bargain in good faith; but in no event shall the sum paid to these employees exceed the amount they would have earned as wages from the date on which the Respondent terminated its operations, to the time they secured equivalent employment elsewhere, or the date on which the Respondent shall have offered to bargain in good faith, whichever occurs sooner; provided, however, that in no event shall this sum be less than the employees would earn for a 2-week period at the rate of their normal wages when last in the Re-

spondent's employ. Backpay shall be based on earnings which the terminated employees would normally have received during the applicable period, less any net interim earnings, and shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

In view of the fact that the Respondent's facility is currently closed, we shall order the Respondent to mail a copy of the attached notice to the Union and to the last known addresses of its former employees in order to inform them of the outcome of this proceeding.

In addition, having found that the Respondent has violated Section 8(a)(1) and (5) by failing to deduct and remit Local 881 union dues for Local 881 unit employees who had executed dues-checkoff authorizations, we shall order the Respondent to deduct and remit union dues as required by the Local 881 contract and to reimburse Local 881 for its failure to do so, with interest as prescribed in *New Horizons for the Retarded*, supra. Having found that the Respondent has violated Section 8(a)(1) and (5) by failing to make contractually required payments for Local 881 unit employees' holiday and vacation pay, Health and Welfare Trust Fund, and IRA accounts and by failure to make contractually required payments for Local 700 unit employees' holiday and vacation pay, Health and Welfare Trust Fund, and the Employer-Union Pension Fund, we shall order the Respondent to make whole its unit employees by (1) paying the respective unit employees the holiday and vacation pay owed them, and the Local 881 unit employees the delinquent IRA contributions and (2) making all delinquent contributions, owed the respective funds including any additional amounts due such funds in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979). In addition, the Respondent shall reimburse unit employees for any expenses ensuing from its failure to make the required fund contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981). All backpay amounts owing the respective unit employees shall be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, supra.

ORDER

The National Labor Relations Board orders that the Respondent, Sheehy's Foodland, Inc./Town and Country Plaza, Marion, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to bargain in good faith with Local 881 and Local 700 on behalf of the Local 881 and the Local 700 units respectively, appropriate units for col-

lective bargaining, by (1) failing to provide necessary and relevant information to Local 881; (2) failing to provide notice and an opportunity to bargain to Local 881 and Local 700 regarding the effects of its decision to close its Marion, Illinois facility on the Local 881 and the Local 700 unit employees; (3) failing to deduct and remit union dues to Local 881; (4) failing to make contractually required payments for holiday and vacation pay on behalf of Local 881 and Local 700 unit employees; (5) failing to make contractually required contributions on behalf of Local 881 unit employees to the Health and Welfare Trust Fund and to their IRA accounts; and (6) failing to make contractually required contributions on behalf of Local 700 unit employees to the Health and Welfare Trust Fund and the Employer-Union Pension Fund.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Provide the requested information regarding all eligible members' IRA accounts to Local 881.

(b) On request, bargain collectively with Local 881 and Local 700 regarding the effects of the closure of the Marion, Illinois facility.

(c) Pay the employees in the Local 881 and the Local 700 units their normal wages, with interest, for the period set forth in the remedy section of this decision.

(d) Remit to Local 881 all union dues, with interest, which it has failed to deduct.

(e) Make Local 881 and Local 700 unit employees whole, with interest, for its failure to pay them their contractually required holiday and vacation pay.

(f) Make Local 881 unit employees whole, with interest, where applicable, for its failure to make contractually required payments to the Health and Welfare Trust Fund and to their IRA accounts as set forth in the remedy section of this decision.

(g) Make Local 700 unit employees whole, with interest, where applicable, for its failure to make contractually required payments to the Health and Welfare Trust Fund and to the Employer-Union Pension Fund, as set forth in the remedy section of this decision.

(h) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(i) Mail to all Local 881 and Local 700 unit employees copies of the attached notice marked "Appen-

dix.”³ Copies of this notice on forms provided by the Regional Director for Region 14, after being signed by the Respondent’s authorized representative, shall be mailed by the Respondent immediately upon receipt.

(j) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. February 9, 1994

James M. Stephens, Chairman

Dennis M. Devaney, Member

John C. Truesdale, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

³If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain in good faith with Local 881, United Food and Commercial Workers Union and Local 700, United Food and Commercial Workers Union on behalf of our employees in the appropriate bargaining units set forth in our contracts with Local 881 and Local 700 by (1) failing to provide necessary and relevant information to Local 881; (2) failing to provide notice and an opportunity to bargain

to Local 881 and Local 700 regarding the effects of our decision to close our Marion, Illinois facility on the Local 881 and the Local 700 unit employees; (3) failing to deduct and remit union dues to Local 881; (4) failing to make contractually required payments for holiday and vacation pay on behalf of Local 881 and Local 700 unit employees; (5) failing to make contractually required contributions on behalf of Local 881 unit employees to the Health and Welfare Trust Fund and to their IRA accounts; and (6) failing to make contractually required contributions on behalf of Local 700 unit employees for the Health and Welfare Trust Fund and the Employer-Union Pension Fund.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL provide the requested information regarding all eligible members’ IRA accounts to Local 881.

WE WILL, on request, bargain collectively with Local 881 and Local 700 regarding the effects of closure of our Marion, Illinois facility.

WE WILL pay our employees in the Local 881 and the Local 700 units their normal wages, with interest, for the period required by the National Labor Relations Board.

WE WILL remit to Local 881 all union dues, with interest, which we have failed to deduct.

WE WILL make Local 881 and Local 700 unit employees whole, with interest, for our failure to pay them their contractually required holiday and vacation pay.

WE WILL make Local 881 unit employees whole, with interest, where applicable, for our failure to make contractually required payments to the Health and Welfare Trust Fund and to their IRA accounts.

WE WILL make Local 700 unit employees whole, with interest, where applicable, for our failure to make contractually required payments to the Health and Welfare Trust Fund and to the Employer-Union Pension Fund.

SHEEHY’S FOODLAND, INC./TOWN AND
COUNTRY PLAZA